

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

David M. Martinko

v.

Case No. 22-cv-238-LM

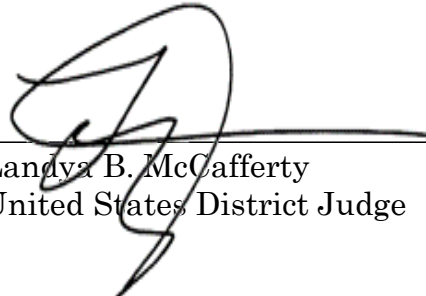
NH Department of Corrections, et al.

**O R D E R**

No objection having been filed, I herewith approve the Endorsed Report and Recommendation of Magistrate Judge Andrea K. Johnstone dated September 5, 2023 (“R&R”). For the reasons explained therein in the R&R, the motion to dismiss (doc. no. 46) is denied without prejudice. As the R&R explains, defendants’ motion to dismiss references matters not contained in the Complaint. To consider those matters, the court would first need to convert the motion to one for summary judgment. At the time of the R&R, defendants had not yet filed an Answer to the Complaint. Thus, the court denied the motion to dismiss without prejudice to defendants’ right to file an Answer and then a motion for summary judgment. This means that the denial of the motion to dismiss does not affect plaintiff’s claims, but instead allows the defendants to file an Answer. On September 19, 2023, defendants filed their Answer to the Complaint (doc. no. 54), and then on September 21, 2023, filed a motion for summary judgment (doc. no. 55). On or before October 23, 2023, plaintiff shall file his response to the motion for summary judgment.

“[O]nly those issues fairly raised by the objections to the magistrate's report are subject to review in the district court and those not preserved by such objection are precluded on appeal.” [School Union No. 37 v. United Nat'l Ins. Co.](#), 617 F.3d 554, 564 (1st Cir. 2010) (quoting [Keating v. Secretary of Health & Human Servs.](#), 848 F.2d 271, 275 (1st Cir.1988)); see also [United States v. Valencia-Copete](#), 792 F.2d 4, 6 (1st Cir. 1986) (after proper notice, failure to file a specific objection to magistrate's report will waive the right to appeal).

SO ORDERED.



Landya B. McCafferty  
United States District Judge

Date: September 22, 2023

cc: David M. Martinko, pro se  
Counsel of Record